

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

FERMIN MENDOZA;  
FRENCHMAN HILL  
APARTMENTS RESIDENT  
ASSOCIATION,

Plaintiffs,

v.

FRENCHMAN HILL  
APARTMENTS LIMITED  
PARTNERSHIP; CAMBRIDGE  
MANAGEMENT, INC.; HOUSING  
AUTHORITY OF GRANT  
COUNTY; JOHN POLING, in his  
official capacity as Executive  
Director of the Housing Authority of  
Grant County; WASHINGTON  
STATE HOUSING FINANCE  
COMMISSION; KIM HERMAN in  
his official capacity as Executive  
Director of the Washington State  
Housing Finance Commission,

Defendants.

NO. CV-03-494-RHW

**ORDER DENYING IN PART  
AND GRANTING IN PART  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

Before the Court is Plaintiffs' Motion for Summary Judgment (Ct. Rec. 31). A hearing on the above motion was held on January 6, 2005, in Spokane, Washington. The Plaintiffs were represented by Judith Lurie and Stephen Frederickson. Defendants Washington State Housing Finance Commission and Kim Herman (the "Commission") were represented by John Nelson. Defendants Frenchman Hill Apartments Limited Partnership, Cambridge Management, Inc., Housing Authority of Grant County, and John Poling were represented by Thomas

1 Ahearne.

2 The Plaintiffs seek partial summary judgment that: (1) the Washington State  
3 Housing Finance Commission and the Frenchman Hill Apartments Limited  
4 Partnership (“FHA Partnership”) violated 26 U.S.C. § 42(h)(6) by failing to have  
5 in place an agreement expressly prohibiting the eviction of low-income residents  
6 without good cause; and (2) that the FHA Partnership and the management of the  
7 Frenchman Hill Apartments violated the due process clause by attempting to  
8 terminate the Mendoza family’s tenancy without good cause. The Plaintiffs allege  
9 that both claims are enforceable through 42 U.S.C. § 1983 and seek declaratory  
10 and injunctive relief.

11 For the reasons stated herein, the Court *sua sponte* grants summary  
12 judgment in the Defendants’ favor on the claim for relief under 26 U.S.C.  
13 §42(h)(6), and grants Plaintiff’s motion for summary judgment, on narrow  
14 grounds, on the due process claim.

### 15 Standard of Review

16 Summary judgment is appropriate if the “pleadings, depositions, answers to  
17 interrogatories, and admissions on file, together with the affidavits, if any, show  
18 that there is no genuine issue as to any material fact and that the moving party is  
19 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). When considering  
20 a motion for summary judgment, a court may neither weigh the evidence nor assess  
21 credibility; instead, “the evidence of the non-movant is to be believed, and all  
22 justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby,*  
23 *Inc.*, 477 U.S. 242, 255 (1986).

24 “Even when there has been no cross-motion for summary judgment, a  
25 district court may enter summary judgment *sua sponte* against a moving party if  
26 the losing party has had a ‘full and fair opportunity to ventilate the issues involved  
27 in the matter.’” *Gospel Missions of America v. City of Los Angeles*, 328 F.3d 548,

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**ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS’  
MOTION FOR SUMMARY JUDGMENT \* 2**

1 553 (9th Cir. 2003) (citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir.  
2 1982)).

### 3 Facts

4 Defendant Fermin Mendoza and his family are residents of the Frenchman  
5 Hill Apartments (the “Apartments”), located in Royal City, Washington. On  
6 August 27, 2000, Mr. Mendoza entered into a six-month lease that automatically  
7 converted to a month-to-month tenancy. The lease agreement designates his  
8 apartment as a low-income housing unit. On or about November 25, 2003, Mr.  
9 Mendoza was served with a 20-day eviction notice, terminating his tenancy  
10 effective December 31, 2003. The notice did not provide any reasons for the  
11 termination of his tenancy.<sup>1</sup>

12 The Apartments are owned by the Defendant Frenchman Hill Apartments  
13 Limited Partnership (“FHA Partnership”). The FHA Partnership receives annual  
14 tax credits for the Apartments through the Federal Low Income Housing Tax  
15 Credit Program, 26 U.S.C. § 42. One-hundred percent of the 25 housing units at  
16 the Apartments are set aside for low-income residents.

17 The managing general partner of the FHA Partnership is the Defendant  
18 Housing Authority of Grant County (“GCHA”). GCHA owns .01 percent of the  
19 FHA Partnership, and is the general partner of the Partnership. The GCHA  
20 manages the day-to-day affairs of the FHA Partnership. The GCHA is a public  
21 housing authority and municipal corporation, established pursuant to Wash. Rev.  
22 Stat. § 35.82. The Apartments are managed by Cambridge Management, Inc.  
23 (“Cambridge”), a private corporation. The 99.99% owner of the FHA Partnership  
24

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25 <sup>1</sup> The Defendants have since stipulated to a preliminary injunction that  
26 prevents the eviction of Mr. Mendoza or other residents of the FHA Apartments.  
27 In addition, the Defendants have accepted rent from Mr. Mendoza, voiding the  
28 eviction notice. Therefore, the Plaintiff is not under immediate threat of eviction.

1 is Related Capital Partners XI, L.P.

2 The Apartments are subject to a “Regulatory Agreement (Extended Use  
3 Agreement),” that was executed by the FHA Partnership and the Washington State  
4 Housing Commission. This agreement is intended to serve as the extended low-  
5 income housing commitment, required by 26 U.S.C. § 42, for the allocation of low-  
6 income housing tax credits. The agreement, however, does not explicitly prohibit  
7 the eviction of tenants from low-income units other than for good cause during the  
8 entire extended low-income housing period.

9 Frenchman Hill Apartments Resident Association (the “Association”) is a  
10 community group made up of tenants of the Frenchman Hill Apartments that was  
11 formed to represent the interests of current residents of the apartment complex.

## 12 Discussion

### 13 1. Mootness

14 The Defendants assert that the Plaintiffs claims are moot because (1)  
15 Defendant Washington State Housing Commission is in the process of complying  
16 with the IRS Revenue Ruling 2004-82, which would provide the Plaintiffs with the  
17 protections they seek; (2) the FHA Partnership has filed a document confirming  
18 that it will comply with the IRS Revenue Ruling 2004-82 as long as that ruling  
19 remains in effect; and (3) Plaintiffs have since accepted rent from Mr. Mendoza,  
20 thus nullifying the notice for the purpose of the Washington Unlawful Detainer  
21 Act. Wash. Rev. Stat. § 59.12 *et seq.*

22 In order for plaintiffs to have standing to seek an injunction or declaratory  
23 relief, they must demonstrate that their claims of continuing injury are not  
24 speculative. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). If plaintiffs  
25 cannot show continuing injury, they may nonetheless comply with Article III under  
26 the capable of repetition, yet evading review exception to the doctrine of mootness.  
27 *See N.A.A.C.P. v. City of Richmond*, 743 F.2d 1346m 1353 (9th Cir. 1984).

28 The Court finds that the issuance of IRS Ruling 2004-82 does not render this

1 action moot. While the IRS ruling is highly relevant to the situation at hand, it is  
2 not binding on this Court. *See Omohundro v. United States*, 300 F.3d 1065, 1068  
3 (9<sup>th</sup> Cir. 2002). Moreover, the ruling by its own terms only requires compliance  
4 within one calendar year. Because the Defendants have not yet fully complied  
5 with the ruling and the alleged violations of 26 U.S.C. § 42(h)(6) may continue in  
6 the interim, the Court finds that a live controversy still exists.

7 Furthermore, the acceptance of rent has not mooted this action. *See*  
8 *Housing Resource Group v. Price*, 958 P.2d 327 (Wash. Ct. App. 1998) (holding  
9 that if landlord accepts rent with knowledge of prior breach of lease covenant,  
10 landlord generally waives right to evict based on that breach). The Defendants  
11 only accepted rent from Mr. Mendoza after this lawsuit was filed. If the  
12 Defendant's acceptance of rent rendered this action moot, the Plaintiff's claim  
13 would fall into the category of situations of wrongs capable of repetition and  
14 evading review. "The 'capable of repetition, yet evading review' exception to  
15 mootness applies when (1) the challenged action is too short in duration to be fully  
16 litigated before cessation or expiration, and (2) there is a reasonable expectation  
17 that the same complaining party will be subjected to the same action again." *Cole*  
18 *v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000).

19 In *Gallman v. Pierce*, a district court applied the capable of repetition, yet  
20 evading review exception to the termination of public housing tenants' leases. 639  
21 F. Supp. 472, 480 (N.D. Cal. 1986). The court explained in *Gallman* that the first  
22 prong of the capable of repetition, yet evading review exception review was met  
23 because

24 month to month tenants receive either a three or a thirty day notice of  
25 termination. A period of a month, and certainly three days, is a very brief  
26 time in which to litigate unstated reasons for termination, or alleged  
statutory and constitutional alleged deficiencies in the notice.

27 Under the Washington Unlawful Detainer Act, a similarly short time frame is  
28 involved. *See* Wash. Rev. Stat. § 59.12 *et seq.* Moreover, as in *Gallman*, there can

1 be no serious question about the likelihood that the plaintiffs will at some time  
2 receive other termination notices. Accordingly, the Court finds that the capable of  
3 repetition, yet evading review exception applies and a justiciable controversy  
4 exists.

## 5 **2. The Federal Low Income Housing Tax Credit Program**

6 Plaintiffs allege that the Federal Low Income Housing Tax Credit Act, 26  
7 U.S.C. § 42, confers individual rights on low income tenants that are enforceable  
8 through 42 U.S.C. § 1983. The Defendants dispute this assertion, arguing that the  
9 only remedy for violation of the tax-credit program is revocation of the tax credits  
10 by the Internal Revenue Service.

### 11 **A. The Duration fo the Good Cause Eviction Requirement**

12 The parties contest whether the good cause eviction requirement applies to  
13 the full duration of a housing development's low-income housing commitment, or  
14 only during the transitional periods described at 26 U.S.C. § 42(h)(6)(E). The  
15 Court looks to the plain language of the statute, any relevant legislative history and  
16 agency interpretation to interpret the statute.

17 The Federal Low Income Housing Tax Credit Program, 26 U.S.C. § 42, was  
18 enacted under Congress's taxing and spending powers, to support the development  
19 of low-income housing. In order to receive tax credits, housing developments must  
20 enter into long-term commitments to offer low-income housing to qualified  
21 persons. Under 26 U.S.C. § 42(h)(6)(A), "[n]o [tax] credit shall be allowed . . .  
22 unless an extended low-income housing commitment is in effect as of the end of  
23 such taxable year."

24 An "extended low-income housing commitment" is defined in 26 U.S.C.  
25 § 42(h)(6)(B) as an "agreement between the taxpayer and the housing credit  
26 agency." An "extended low-income housing commitment" is defined as an  
27 agreement between the taxpayer (here, FHA Partnership) and the housing credit  
28 agency (here, the Commission) "which prohibits the actions described in

1 subclauses (I) and (ii) of subparagraph (E)(ii). 26 U.S.C. § 42(h)(6)(B)(i)  
2 Subparagraph (E)(ii), in turn, provides for certain prohibitions against “eviction or  
3 the termination of tenancy (other than for good cause),” 26 U.S.C. §  
4 42(h)(6)(E)(ii)(I), and must “allo[w] individuals who meet the income limitations .  
5 . . to enforce [the good cause requirement] in any State court.” 26 U.S.C. §  
6 42(h)(6)(B)(ii).

7 When interpreting a statute, courts must examine the plain language of the  
8 statute to “derive meaning from context, and this requires reading the relevant  
9 statutory provisions as a whole.” *See United States v. Hanousek*, 176 F.3d 1116,  
10 1120 (9th Cir.1999) (citations omitted). Here, the Defendants argue that, based  
11 upon the legislative history of section 42, 26 U.S.C. § 42(h)(6)(B)(i) implicitly  
12 incorporates the limitations contained in subsections (h)(6)(E)(I) and (II), and  
13 therefore the good cause limitations only apply for a three year period in certain  
14 circumstances such as foreclosure, or sale. The plain language of 26 U.S.C. §  
15 42(h)(6)(B)(i), however, only points to the “subclauses (I) and (II) of subparagraph  
16 (E)(ii)” and no more. In the following subclause 42(h)(6)(B)(ii), which provides  
17 that the good cause requirement must be enforceable in state court, no mention is  
18 made of limiting the duration of the enforceability of the good cause requirement  
19 to a three year period. Therefore, the plain language of the statute supports the  
20 Plaintiffs’ contention that the good cause requirement shall be in effect for the  
21 entirety of the low-income housing commitment.

22 The Plaintiffs, in turn, assert that this Court should determine that the good  
23 cause eviction requirement applies to the full duration of a housing development’s  
24 low-income housing commitment based on IRS Revenue Ruling 2004-82. That  
25 ruling unequivocally holds that the good cause limitations of 26 U.S.C. §  
26 42(h)(6)(E)(ii) applies during the entire extended low-income housing  
27 commitment. While the Court is not bound by this interpretation, it has great  
28 persuasive value, and suggests that the FHA Partnership is bound by the good

1 cause requirement for the full 30 years of its commitment. *See Omohundro*, 300  
2 F.3d at 1068 (court should defer to agency decision based on thoroughness evident  
3 in consideration, reasoning and consistency).

4 Finally, other courts to interpret 26 U.S.C. §§ 42(h)(6)(B)(i) and  
5 42(h)(6)(E)(ii)(I) have found that the extended low-income housing commitment  
6 must include a prohibition against eviction without good cause for the duration of  
7 the extended low-income housing commitment. *See Carter v. Maryland Mgmt.*  
8 *Co.*, 337 Md. 596 (2003); *Cimarron Village v. Washington*, 649 N.W. 2d 811  
9 (Minn. Ct. App. 2003). The Court finds the analysis and reasoning of these  
10 opinions highly persuasive.

11 For these reasons, the Court finds that the prohibition contained in  
12 42(h)(6)(E)(ii)(I) must be in effect for the duration of the extended low-income  
13 housing commitment.

#### 14 **B. The Existence of an Enforceable Right**

15 Plaintiffs argue that the good cause provision of 26 U.S.C. §§ 42(h)(6)  
16 creates an enforceable right under 42 U.S.C. § 1983. Section 1983 creates a  
17 federal remedy for violations of federal statutes by agents of the state. *See Maine*  
18 *v. Thiboutot*, 448 U.S. 1 (1980). Section 1983 provides, *inter alia*, that:

19 Every person who, under color of any statute, ordinance, regulation, custom,  
20 or usage . . . subjects, or causes to be subjected, any citizen of the United  
21 States or other person within the jurisdiction thereof to the deprivation of  
22 any rights, privileges, or immunities secured by the Constitution and laws,  
23 shall be liable to the party injured in an action at law, suit in equity, or other  
24 proper proceeding for redress . . . .

25 42 U.S.C. § 1983. Two exceptions to this doctrine exist. First, section 1983 may  
26 be used only to remedy statutory violations where an independent statute creates an  
27 enforceable right, privilege, or immunity. *See Pennhurst State School and*  
28 *Hospital v. Halderman*, 451 U.S. 1 (1981). Second, section 1983 is not available  
where Congress has demonstrated an intent to foreclose the use of section 1983  
through a comprehensive remedial scheme. *See Middlesex County Sewerage*

1 *Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981).

2       The Supreme Court most recently addressed the issue of whether federal  
3 statutes create rights enforceable under section 1983 in *Gonzaga University v. Doe*,  
4 536 U.S. 273 (2002). In *Gonzaga*, the Supreme Court found that a student could  
5 not sue a private university for damages under section 1983 to enforce provisions  
6 of the Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. §  
7 1232g, which prohibits the federal funding of educational institutions that have a  
8 policy or practice of releasing education records to unauthorized persons. The  
9 Court found that FERPA’s nondisclosure provisions failed to confer enforceable  
10 rights because they (1) lack the sort of “rights-creating” language critical to  
11 showing congressional intent to create new rights; (2) are concerned with the  
12 “aggregate” effect of institutional policy and practice and are not concerned with  
13 “whether the needs of any particular person have been satisfied;” and (3) serve  
14 primarily to direct the distribution of public funds. *Id.* at 290-91.

15       Under the *Gonzaga* standard, the provisions of 26 U.S.C. § 42 do not appear  
16 to confer individual rights upon the Plaintiffs in this action. First, the only “rights-  
17 creating” language contained in 26 U.S.C. § 42(h) is several steps removed from  
18 the residents themselves. Under the statute, in order for a housing development to  
19 enjoy tax credits it must enter into an agreement with the housing credit authority  
20 (here, the Washington State Housing Commission) to provide certain benefits to  
21 low-income residents, including prohibitions against eviction without cause that  
22 are enforceable in state courts. At most, section 42 uses Congress’s taxing and  
23 spending power to create a private cause of action for specific performance against  
24 a taxpayer. The legislative history of the Act supports this conclusion: the  
25 “Explanation of Provisions” section of House Report 101-247 (Sept. 20, 1989)  
26 explains the reason subsection (h)(6) was added and states that “[t]his provision  
27 contemplates a remedy of specific enforcement in the State courts but does not  
28 create a remedy under Federal Law.”

1 Accordingly, the Court finds that the language of 26 U.S.C. § 42(h) is not  
2 equivalent to the language of Title VII, cited by the Supreme Court in *Gonzaga*, as  
3 classic rights-creating language: “No person in the United States shall . . . be  
4 subjected to discrimination under any program or activity receiving Federal  
5 financial assistance.” *See Gonzaga*, 536 U.S. at 284, n. 3 (citing 42 U.S.C.  
6 § 2000d). Instead, the benefits conferred upon low-income residents through the  
7 tax credit program are tangential to the agreement between the taxpayer and the  
8 housing credit authority. However, it is “rights, not the broader or vaguer  
9 ‘benefits’ or ‘interests,’ that may be enforced under the authority” of section 1983.  
10 *Gonzaga*, 536 U.S. at 283.

11 Second, the tax credit program also has an “aggregate” rather than individual  
12 focus. Instead of requiring strict compliance on a case-by-case basis, the act only  
13 requires “substantial” compliance. Should a taxpayer fail to have an “extended  
14 low income housing commitment” with good cause eviction protection in effect,  
15 section 42(h)(6)(J) provides that the “[e]ffect of noncompliance” is that the  
16 taxpayer will be denied the credit for the current year unless “the failure is  
17 corrected within 1 year from the date of the determination.” Therefore, a taxpayer  
18 could fail to have an extended low income housing commitment in effect for  
19 eleven months and still comply with the Act. In *Gonzaga*, the court focused on the  
20 fact that funding recipients could avoid termination of funding through substantial  
21 compliance with the FERPA; the Court found that substantial compliance  
22 provisions could not demonstrate the requisite congressional intent to confer  
23 individual rights. *Gonzaga*, 536 U.S. at 288-89.

24 Finally, as in *Gonzaga*, the Federal Low Income Housing Tax Credit Act  
25 serves primarily to direct the distribution of government funds rather than to confer  
26 rights. Section 42 governs the distribution of tax credits to private housing  
27 developers and encourage development of low-income housing, rather than to  
28 confer rights on low-income tenants or develop publicly- owned housing projects

1 (such as Section 8 housing). For these reasons, the Court finds that the Act does  
2 not meet the individual rights test espoused by the Supreme Court in *Gonzaga* and  
3 does not provide a private right of action that can be enforced under section 1983.

4 The conclusion that no individual enforceable right exists under section 42 is  
5 buttressed by the fact that Congress has created an alternate enforcement scheme  
6 for the tax credit program. The Act requires qualified housing credit agencies to  
7 submit qualified allocation plans, which must outline the “procedure that the  
8 agency (or an agent or other private contractor of such agency) will follow in  
9 monitoring for noncompliance with the provisions of this section and in notifying  
10 the Internal Revenue Service of such noncompliance . . . .” 26 U.S.C. §  
11 42(m)(1)(B)(iii). As part of this allocation plan, the Washington State Housing  
12 Finance Commission requires Frenchman Hill to abide by the terms of the Low  
13 Income Housing Tax Credit Program as a condition of its Regulatory Agreement.  
14 The partnership must submit an annual certification to the Commission, providing  
15 under penalty of perjury, that an extended low-income housing commitment was in  
16 effect at all times during the preceding 12 months (See Ex. 1 to Commission’s  
17 Answer, §§ 4.17, 5.8). Therefore, the housing credit agency acts as a watchdog for  
18 the IRS. The IRS, in turn, has ample auditing power to strip undeserving  
19 developments of their tax credits or prosecute wayward taxpayers.

20 In their responsive briefing, the Defendants seek dismissal of the Plaintiffs’  
21 section 1983 claims on the ground that 26 U.S.C. § 42 does not create enforceable  
22 rights. Since this motion is not properly raised as a cross-motion for summary  
23 judgment, the Court finds it is proper to enter judgment *sua sponte*. The fact that  
24 Defendants raised the specter of dismissal, however, provides evidence that the  
25 Plaintiffs have had a full and fair opportunity to “ventilate” the issues involved in  
26 the matter. In an abundance of caution, the Court grants Plaintiffs leave to file an  
27 objection to the entry of summary judgment, *sua sponte*, within ten days of the  
28 entrance of this order. If no objection is received, the Court will find that no

1 private right of action exists under 26 U.S.C. § 42(h)(6), and *sua sponte* grant  
2 summary judgment for Defendants on this claim.

### 3 **3. Due Process**

4 The Plaintiffs allege that the FHA Partnership, Cambridge Management, Inc.  
5 (“Cambridge”), the Housing Authority of Grant County, and John Poling, have  
6 violated the due process guarantees of the United States Constitution by attempting  
7 to evict the Plaintiff from his apartment without good cause. The Plaintiffs argue  
8 that low-income tenants at Frenchman Hill have a legitimate claim of entitlement  
9 to the continued use and enjoyment of their homes, and public housing authorities  
10 are government agencies whose actions are subject to due process requirements.  
11 The Defendants assert that because Frenchman Hill Apartments is a private  
12 housing complex, the FHA Partnership should not be subject to the due process  
13 clause. Moreover, the Defendants assert that the tenants do not have a property  
14 interest in their tenancies because the good cause requirement is not in effect for  
15 the entire long-term commitment period.

16 To survive summary judgment, the Plaintiffs must present facts  
17 demonstrating (1) sufficient governmental participation and involvement to subject  
18 the Defendants to the due process clause; (2) a constitutionally protected property  
19 interest in not being evicted from their apartments; and (3) that they were denied  
20 procedural safeguards required by due process. *See Geneva Towers Tenants Org.*  
21 *v. Federated Mortgage Investors*, 504 F.2d 483 (9<sup>th</sup> Cir. 1974).

#### 22 **A. Government Action**

23 As a starting matter, to prevail under section 1983, the Plaintiffs must show  
24 that the Defendants’ “actions were fairly attributable to the federal or state  
25 government.” *See Mathis v. Pacific Gas & Elec. Co.*, 75 F.3d 498, 502 (9<sup>th</sup> Cir.  
26 1996) (*citing Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)). Action by  
27 a private party, without something more, is not sufficient to justify a  
28 characterization of that party as a state actor. The Supreme Court has that a private

1 actor may be characterized as a state actor when there is a sufficient “nexus” or  
2 symbiotic relationship between state and private activity. *See Jackson v.*  
3 *Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking*  
4 *Authority*, 365 U.S. 715 (1961). Any inquiry into whether a private entity should  
5 be characterized as a state actor is fact specific. *See Howerton v. Gabicia*, 708  
6 F.2d 380, 383 (9th Cir. 1983). “[S]ubstantial coordination and integration between  
7 the private entity and the government are the essence of a symbiotic relationship.”  
8 *Brunette v. Humane Society of Ventura County*, 294 F.3d 1205, 1213 (9th Cir.  
9 2002). Courts have looked to evidence of a government entity’s financial  
10 interdependence with or plenary control over a private entity to determine if a  
11 symbiotic relationship exists. *Id*; *but see Leeds v. Meltz*, 86 F.3d 51, 54 (2d Cir.  
12 1996) (holding that neither government funding nor regulation alone is sufficient  
13 to confer section 1983 liability on private actors).

14 The Court finds that a symbiotic relationship exists between Grant County  
15 Housing Authority and the FHA Partnership, and based on this relationship the  
16 actions of the FHA Partnership are sufficiently attributable to the state. Because  
17 the Grant County Housing Authority is the general partner of the FHA Partnership  
18 and manages the Partnership’s day-to-day affairs, there is significant government  
19 control over the private entity’s actions. As such, the daily decision of the FHA  
20 Partnership are, in truth, the decisions of the state actor. Furthermore, the FHA  
21 Partnership and GCHA are financially interrelated. GCHA is a .01 percent owner  
22 of the FHA Partnership. Moreover, the Plaintiffs point out, that the FHA  
23 Partnership developed the Apartments through the sale of tax credits, monies from  
24 the Washington State Housing Trust Fund, Community Development Block Grant  
25 Funds, and the Federal Home Loan Bank of Seattle. This funding package was  
26 coordinated, in part, by the Grant County Housing Authority. The Defendants  
27 argue that FHA Partnership is not a state actor, because the partnership agreement  
28 allows the 99.99% owner, Related Capital Partners XI, L.P., to remove Grant

County. The fact that a government entity or a private party may choose to extricate itself from a symbiotic relationship, however, does not negate the existence of that relationship.

The parties do not dispute that GCHA or John Poling are state actors. Cambridge Management, Inc., however, is a management company acting at the behest of FHA Partnership as an independent contractor. The Plaintiffs have alleged no facts sufficient to show Cambridge is a state actor.

### **B. Constitutionally Protected Property Interest**

The Plaintiffs must establish that they have a legitimate, objectively justifiable claim to the benefits of the government program. In *Board of Regents v. Roth*, the Court held that:

[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

408 U.S. 564, 477 (1972). The Supreme Court has explained that in order to have a property interest in a governmental benefit (as opposed to a right), the receipt of that benefit must be guaranteed absent cause for termination. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978).

Plaintiffs allege that they have a legitimate interest in the continued use and enjoyment of their rent-controlled apartments, because the receipt of that benefit is guaranteed, absent good cause eviction. The Plaintiffs analogize the below-market housing provided by the Apartments to the rent subsidies provided under the Section 8 Set-Aside Program, 42 U.S.C. § 1437f. *See Gallman v. Pierce*, 639 F. Supp. 472 (N.D. Cal. 1986) (holding that section 8 tenants had a property interest in not being evicted without good cause); *Joy v. Daniels*, 479 F.2d 1236, 1241 (4<sup>th</sup> Cir. 1973) (holding tenant in private housing receiving federal rent subsidy has a property interest in continuing his tenancy, absent good cause to terminate); and *Escalara v. New York City Housing Auth.*, 425 F.2d 853 (2d Cir. 1970) (holding

1 public housing tenant has property right in ongoing tenancy). As discussed *supra*,  
2 the Court finds that under section 42(h)(6)(B)(i) the extended low-income housing  
3 commitment must include a prohibition on eviction without good cause during the  
4 entire extended use period. Accordingly, the Court finds that because the  
5 Frenchman Hill Apartment low-income tenants are entitled to continue to reside in  
6 their apartments, absent good cause for eviction, they have a property right in their  
7 tenancy.<sup>2</sup>

### 8 C. Procedural Safeguards

9 Plaintiffs assert that Mr. Mendoza received insufficient procedural  
10 protections in his without cause eviction notice. The parties agree that the only  
11 process Defendant received was a 20-day notice under Washington law that did not  
12 specify a cause for his eviction. Plaintiff Mendoza, however, does not request an  
13 administrative hearing on his eviction notice, which has since been voided.  
14 Instead, he requests a declaratory judgment that “[e]victions financed under the  
15 Tax Credit Program are governed by the Due Process Clause of the Fourteenth  
16 Amendment” and that “[d]ue process requires that tenants of Tax Credit projects be  
17 informed of the reasons for eviction; that tenants of Tax Credit projects have a  
18 meaningful opportunity to contest the grounds alleged for eviction; and that the  
19 owner or managing agent of Tax Credit projects establish good cause prior to  
20 eviction.” (*Plaintiffs’ Memorandum in Support of Summary Judgment* at 17.)

21 In the public housing context, courts have applied *Goldberg v. Kelly*, 397  
22 U.S. 254 (1970), to hold that public housing tenants (who are subject to eviction  
23 only with good cause) are entitled to (1) timely and adequate notice detailing the  
24 reasons for a proposed termination or eviction; (2) a hearing before an impartial  
25 decision maker; (3) the ability to cross-examine adverse witnesses; (4) the

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26  
27 <sup>2</sup> This property right exists as long as the FHA Partnership participates in  
28 the tax credit program.

1 opportunity to be represented by counsel at the hearing; and (5) a decision, based  
2 on evidence adduced at the hearing. *See Caulder v. Durham Housing Auth.*, 433  
3 F.2d 998 (4th Cir. 1970); *Escalera v. New York City Housing Auth.*, 425 F.2d 853  
4 (2d Cir. 1970).

5 In the case at hand, Mr. Mendoza was not provided with timely and adequate  
6 notice detailing the reasons for a proposed eviction. Instead, he was provided a  
7 notice of eviction without cause. The Court finds that by failing to provide  
8 detailed reasons for the proposed eviction, the owners and managers of the  
9 Apartments violated Mr. Mendoza's right to due process.

10 Beyond providing for good cause protections that may be specifically  
11 enforced, the Low-Income Housing Tax Credit program does not purport to govern  
12 eviction or termination procedures. Therefore, the Court must look to the  
13 procedures provided by the state of Washington. *See Gallman*, 639 F. Supp. at  
14 477. Washington law provides a summary procedure for evicting tenants. Wash.  
15 Rev. Code §§ 59.12, 59.18 *et seq.* Under the procedure described in section  
16 59.18.380, the landlord is entitled to a show cause hearing, and at that hearing the  
17 parties argue the merits of the case. *See Housing Authority of King County v.*  
18 *Saylors*, 578 P.2d 76 (Wash. Ct. App. 1978). At this hearing, the tenant may raise  
19 the affirmative defense that there is no good cause for eviction or termination. *Id.*  
20 at 874. Other states have allowed tenants to raise the defense of absence of good  
21 cause even if the good cause requirement is not explicitly listed in the extended  
22 long-term housing commitment. *See, i.e., Carter v. Maryland Mgmt. Co.*, 835  
23 A.2d 158 (2003); *Cimarron Village v. Washington*, 649 N.W. 2d 811 (Minn. Ct.  
24 App. 2003). Accordingly, with the exception of the notice and contents of the  
25 eviction notice, the Washington statutes provide adequate procedural safeguards to  
26 Mr. Mendoza.

#### 27 **4. Declaratory Relief Regarding Propriety of Tax Credits**

28 The Plaintiffs seek a declaratory judgment under 28 U.S.C. § 2201 and

1 Federal Rule of Civil Procedure 57 that:

- 2 b. Agreements prohibiting the eviction or termination of tenancy without  
3 good cause and meeting the other requirements of 26 U.S.C. § 42  
4 (h)(6) must be in effect before tax credits can be allowed under the  
5 Tax Credit Program.
- 6 c. The Defendants' Regulatory Agreement fails to comply with 26  
7 U.S.C. § 42(h)(6) and fails to satisfy a mandatory condition precedent  
8 for the allowance of tax credits because it fails to include express  
9 language prohibiting the eviction or termination of tenancies of  
10 tenants of any low-income units other than for good cause.
- 11 d. The Defendant FHA is not eligible to receive tax credits under the Tax  
12 Credit Program unless and until it and the Commission have in place  
13 an agreement that prohibits the eviction or the termination of tenancy  
14 (other than for good cause) of any tenant of any low-income unit.

15 (*Plaintiffs' Memo.* at 17). The Plaintiffs are third-party beneficiaries of the Low-  
16 Income Housing Tax Credit Program and, therefore, have no standing to challenge  
17 tax determinations by the IRS. *See Simon v. Eastern Kentucky Welfare Rights*  
18 *Org.*, 426 U.S. 26 (1976). Accordingly, the Court finds that Plaintiffs are not  
19 entitled to the above declaratory relief as a matter of law.

## 20 **5. Injunctive Relief**

21 The Plaintiffs also seek injunctive relief (1) prohibiting eviction of Plaintiff  
22 Mendoza or other residents of the Apartments without good cause; (2) requiring  
23 the Commission and the FHA Partnership to amend their Regulatory Agreement to  
24 prohibit the eviction of a low-income tenant without cause; and (3) prohibiting the  
25 Commission from allowing tax credits for the Apartments unless and until the FHA  
26 Partnership has in place an agreement that expressly prohibits the eviction or  
27 termination of tenancy (*Plaintiffs' Memo.* at 18). "The requirements for the  
28 issuance of a permanent injunction are the likelihood of substantial and immediate  
irreparable injury and the inadequacy of remedies at law." *American-Arab*  
*Anti-Discrimination Comm'n v. Reno*, 70 F.3d 1045, 1066-67 (9th Cir. 1995)  
(quotations and citations omitted).

The Plaintiffs assert that they are under a substantial and immediate threat of  
eviction, and the remedy provided at law is inadequate because the mere filing of

1 an unlawful detainer action carries with it the stigma of eviction and creates  
2 negative rental history. The Plaintiffs have not shown that Mr. Mendoza or any  
3 other Plaintiff is under threat of immediate eviction. Therefore, the likelihood of  
4 any injury is speculative, at best. For this reason, the Court denies Plaintiffs'  
5 requests for a permanent injunction.

6 For the remaining injunctive relief requested, the Plaintiffs do not present  
7 argument on the likelihood of substantial and immediate irreparable injury or the  
8 inadequacy of remedies at law. Therefore, the requested relief is denied.

9 Having reviewed the record, heard from counsel, and been fully advised in  
10 this matter, **IT IS HEREBY ORDERED** that:

11 1. Plaintiffs' Motion for Summary Judgment (Ct. Rec. 31) is **DENIED IN**  
12 **PART AND GRANTED IN PART.**

13 2. The Court holds that, under the circumstances of this case, the good cause  
14 eviction of low-income tenants from the Frenchman Hill Apartments is governed  
15 by the Due Process Clause of the Fourteenth Amendment. Due process requires  
16 that Mr. Mendoza be provided with timely and adequate notice detailing the  
17 reasons for a proposed termination or eviction.

18 3. The Court grants Plaintiffs **LEAVE** to file an objection **within ten days**  
19 **of this Order** to a *sua sponte* entrance of summary judgment in favor of  
20 Defendants Washington State Housing Commission and Kim Herman summary  
21 judgment on Plaintiffs' claim to a private right of action under 26 U.S.C. §  
22 42(h)(6). Plaintiffs' briefing shall not exceed 10 pages in length. If no objection is  
23 filed, the Court shall enter an order granting summary judgment for Defendants on  
24 this claim. Defendants need not file a response unless the Court orders them to do  
25 so.

26 //

27  
28 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
**ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS'**  
**MOTION FOR SUMMARY JUDGMENT \* 18**

1 Order and forward copies to counsel.

2 **DATED** this 20<sup>th</sup> day of January, 2005.

3  
4 s/ ROBERT H. WHALEY  
5 UNITED STATES DISTRICT JUDGE  
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